

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

AGUSTIN C. ) Case No. CV 18-6044-SP

Plaintiff,

V.

ANDREW M. SAUL, Commissioner of  
Social Security Administration,

Defendant.

Case No. CV 18-6044-SP

## MEMORANDUM OPINION AND ORDER

I.

## **INTRODUCTION**

On July 11, 2018, plaintiff Agustin C. filed a complaint against defendant, the Commissioner of the Social Security Administration (“Commissioner”), seeking a review of a denial of a period of disability and disability insurance benefits (“DIB”). The parties have fully briefed the matters in dispute, and the court deems the matter suitable for adjudication without oral argument.

Plaintiff presents one disputed issue for decision, whether the Administrative Law Judge (“ALJ”) properly considered plaintiff’s subjective complaints.

1 Memorandum in Support of Plaintiff's Complaint ("P. Mem.") at 4-8; *see*  
2 Memorandum in Support of Defendant's Answer ("D. Mem.") at 2-6.

3 Having carefully studied the parties' memoranda on the issue in dispute, the  
4 Administrative Record ("AR"), and the decision of the ALJ, the court concludes  
5 that, as detailed herein, the ALJ's reasons for discounting plaintiff's testimony  
6 were not supported by substantial evidence. The court therefore remands this  
7 matter to the Commissioner in accordance with the principles and instructions  
8 enunciated herein.

9 **II.**

10 **FACTUAL AND PROCEDURAL BACKGROUND**

11 Plaintiff, who was 44 years old on the alleged disability onset date,  
12 completed some high school in Mexico. AR at 125, 142, 292, 537. Plaintiff has  
13 past relevant work as an automobile mechanic, construction worker, and air  
14 conditioning mechanic. *Id.* at 138.

15 On May 27, 2014, plaintiff filed an application for a period of disability and  
16 DIB, alleging an onset date of May 1, 2014 due to cervical disc protrusion, cervical  
17 radiculitis, cervical sprain or strain, lumbar radiculitis, lumbar sprain or strain,  
18 anxiety, and high cholesterol. *Id.* at 142. The Commissioner denied plaintiff's  
19 application initially and upon reconsideration, after which he filed a request for a  
20 hearing. *Id.* at 167-70, 175-80.

21 On December 2, 2016, plaintiff, represented by counsel, appeared and  
22 testified at a hearing before the ALJ, with a Spanish interpreter present to assist as  
23 needed. *Id.* at 118-41. The ALJ also heard testimony from Kristan Cicero, a  
24 vocational expert. *Id.* at 137-40. The ALJ held a supplemental hearing on April 7,  
25 2017, at which plaintiff testified, again with a Spanish interpreter present. *Id.* at  
26 91-117. The ALJ also heard testimony from Dr. Hugh Savage, a medical expert,  
27 and Dr. May, a vocational expert. *Id.* at 96-116. On May 30, 2017, the ALJ

1 denied plaintiff's claim for benefits. *Id.* at 37-46.

2 Applying the well-known five-step sequential evaluation process, the ALJ  
3 found, at step one, that plaintiff had not engaged in substantial gainful activity  
4 since May 1, 2014, the alleged onset date. *Id.* at 39.

5 At step two, the ALJ found plaintiff suffered from the following severe  
6 impairments: bilateral shoulder pain secondary to osteoarthritis of the  
7 acromioclavicular joints; tendinitis of the supraspinatus and infraspinatus muscles;  
8 mild subacromial bursitis; cervicalgia secondary to degenerative disc disease of the  
9 cervical spine; degenerative disc disease of the lumbar spine; and sleep disorder.

10 *Id.*

11 At step three, the ALJ found plaintiff's impairments, whether individually or  
12 in combination, did not meet or medically equal one of the listed impairments set  
13 forth in 20 C.F.R. part 404, Subpart P, Appendix 1. *Id.* at 42.

14 The ALJ then assessed plaintiff's residual functional capacity ("RFC"),<sup>1</sup> and  
15 determined he has the RFC to perform a narrowed range of light work in that he  
16 was able to: lift and carry up to 20 pounds occasionally and 10 pounds frequently;  
17 stand and walk for six hours out of an eight-hour workday; sit for six hours out an  
18 eight-hour workday; occasionally climb or stoop; and frequently kneel, crouch, or  
19 crawl. *Id.*

20 The ALJ found, at step four, that plaintiff was unable to perform his past  
21 relevant work as an automobile mechanic, construction worker, or air conditioning  
22 mechanic. *Id.* at 44.

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23  
24       <sup>1</sup> Residual functional capacity is what a claimant can do despite existing  
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-  
26 56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step evaluation,  
27 the ALJ must proceed to an intermediate step in which the ALJ assesses the  
28 claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151  
n.2 (9th Cir. 2007).

At step five, the ALJ found that given plaintiff's age, education, work experience, and RFC, there were jobs that existed in significant numbers in the national economy that plaintiff could perform, including packing line worker, produce sorter, and laundry worker. *Id.* at 45-46. Consequently, the ALJ concluded plaintiff did not suffer from a disability as defined by the Social Security Act. *Id.* at 46.

Plaintiff filed a timely request for review of the ALJ's decision and submitted additional evidence, but the Appeals Council denied the request for review. *Id.* at 1-4. The ALJ's decision stands as the final decision of the Commissioner.

III.

## STANDARD OF REVIEW

This court is empowered to review decisions by the Commissioner to deny benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security Administration must be upheld if they are free of legal error and supported by substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as amended). But if the court determines that the ALJ's findings are based on legal error or are not supported by substantial evidence in the record, the court may reject the findings and set aside the decision to deny benefits. *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001).

“Substantial evidence is more than a mere scintilla, but less than a preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such “relevant evidence which a reasonable person might accept as adequate to support a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d at 459. To determine whether substantial evidence supports the ALJ’s finding, the reviewing court must review the administrative record as a whole,

1 “weighing both the evidence that supports and the evidence that detracts from the  
2 ALJ’s conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision ““cannot be  
3 affirmed simply by isolating a specific quantum of supporting evidence.””  
4 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th  
5 Cir. 1998)). If the evidence can reasonably support either affirming or reversing  
6 the ALJ’s decision, the reviewing court ““may not substitute its judgment for that  
7 of the ALJ.”” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.  
8 1992)).

9 **IV.**

10 **DISCUSSION**

11 Plaintiff contends the ALJ failed to properly evaluate his testimony. P.  
12 Mem. at 4-8. Specifically, plaintiff argues the ALJ only provided one reason for  
13 finding his complaints less than credible, that plaintiff only received conservative  
14 treatment, and this reason was not clear and convincing and supported by  
15 substantial evidence. *Id.*

16 The ALJ must make specific credibility findings, supported by the record.  
17 SSR 96-7p. To determine whether testimony concerning symptoms is credible, the  
18 ALJ engages in a two-step analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-  
19 36 (9th Cir. 2007). First, the ALJ must determine whether a claimant produced  
20 objective medical evidence of an underlying impairment ““which could reasonably  
21 be expected to produce the pain or other symptoms alleged.”” *Id.* at 1036 (quoting  
22 *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). Second, if there  
23 is no evidence of malingering, an “ALJ can reject the claimant’s testimony about  
24 the severity of her symptoms only by offering specific, clear and convincing  
25 reasons for doing so.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996);  
26 *accord Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). The ALJ may  
27 consider several factors in weighing a claimant’s testimony, including: (1)

1 ordinary techniques of credibility evaluation such as a claimant's reputation for  
2 lying; (2) the failure to seek treatment or follow a prescribed course of treatment;  
3 and (3) a claimant's daily activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039  
4 (9th Cir. 2008); *Bunnell*, 947 F.2d at 346-47.

5 At the first step, the ALJ implicitly found plaintiff's medically determinable  
6 impairments could reasonably be expected to cause the symptoms alleged. *See* AR  
7 at 42-44. At the second step, because the ALJ did not find any evidence of  
8 malingering, the ALJ was required to provide clear and convincing reasons for  
9 discounting plaintiff's credibility. The ALJ provided two reasons for discounting  
10 plaintiff's credibility: (1) plaintiff's conservative treatment was inconsistent with  
11 the alleged severity of his symptoms; and (2) the objective medical evidence did  
12 not support the severity of his symptoms. *Id.*; *see Magallanes v. Bowen*, 881 F.2d  
13 747, 755 (9th Cir. 1989) (an ALJ need not recite "magic words," a reviewing court  
14 may draw inferences from an opinion).

15 The ALJ's first ground for discounting plaintiff's credibility was that his  
16 treatment was inconsistent with the alleged severity of his symptoms. AR at 44;  
17 *see Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007) ("[E]vidence of  
18 'conservative treatment' is sufficient to discount a claimant's testimony regarding  
19 severity of an impairment."); *Tommasetti*, 533 F.3d at 1039-40 (conservative  
20 treatment may be a clear and convincing reason for discounting a claimant's  
21 credibility). The ALJ noted plaintiff only received conservative treatment,  
22 consisting of physical therapy, non-steroidal anti-inflammatories, and narcotic pain  
23 medication. AR at 43-44. Plaintiff contends treatment with narcotic pain  
24 medication and anti-inflammatory injections is not conservative, and he was  
25 recommended other non-conservative treatment options. P. Mem. at 5-6.

26 The Ninth Circuit and its district courts have generally viewed the use of  
27 narcotic pain medication as non-conservative treatment. *See Lapeirre-Gutt v.*  
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1 *Astrue*, 382 Fed. Appx. 662, 664 (9th Cir. 2010) (treatment consisting of “copious”  
2 amounts of narcotic pain medication, occipital nerve blocks, and trigger point  
3 injections was not conservative); *see, e.g., Christie v. Astrue*, 2011 WL 4368189, at  
4 \*4 (C.D. Cal. Sept. 16, 2011) (treatment with narcotics, steroid injections, trigger  
5 point injections, epidural injections, and cervical traction was not conservative).  
6 But in these cases, the claimants typically used narcotic medications in conjunction  
7 with other treatments that were also not conservative. Thus, the use of narcotic  
8 medication, by itself, may be considered conservative treatment. *See Huizar v.*  
9 *Comm'r*, 428 Fed. Appx. 678, 680 (9th Cir. 2011) (finding that plaintiff responded  
10 to conservative treatment, which included the use of narcotic medication); *Higinio*  
11 *v. Colvin*, 2014 WL 47935, at \*5 (C.D. Cal. Jan. 7, 2014) (holding that, despite the  
12 fact that plaintiff had been prescribed narcotic medication at various times,  
13 plaintiff’s treatment as a whole was conservative); *Grisel v. Colvin*, 2014 WL  
14 1315894, at \*12 (C.D. Cal. Apr. 2, 2014) (use of narcotic pain medication was  
15 conservative when it provided relief and was not in combination with other  
16 treatments).

17 Here, the ALJ correctly noted plaintiff used narcotic medication in  
18 conjunction with conservative care such as physical therapy, anti-inflammatories,  
19 and chiropractic care. *See, e.g., Huizar*, 428 Fed. Appx. at 680; *Tommasetti*, 533  
20 F.3d at 1040 (characterizing physical therapy and anti-inflammatories as  
21 conservative); *Garcia v. Colvin*, 2014 WL 6750288, at \*4 (C.D. Cal. Dec. 1, 2014)  
22 (Torodal injection constituted conservative care); *Lane v. Colvin*, 2013 WL  
23 3449631, at \*2 (C.D. Cal. Jul. 9, 2013) (chiropractic treatment is conservative).  
24 On this basis, his treatment can therefore be characterized as conservative.

25 But the ALJ failed to recognize the record reflects that other non-  
26 conservative treatment options, including epidural injections and surgery, were  
27 discussed with or recommended to plaintiff. Dr. Arthur Harris, an orthopedic  
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1 surgeon treating plaintiff in connection to his worker's compensation case,  
2 discussed epidural steroid injections and surgery as options for plaintiff. AR at  
3 631, 638, 644, 651, 662, 680. In September 2015, an examining spine surgeon at  
4 Kaiser recommended epidural injections, selective nerve root block, and a  
5 Rhizotomy procedure, but did not recommend surgery for plaintiff. *Id.* at 1387.  
6 The physician's reason was not for lack of severity, but because plaintiff's pain  
7 was multifactorial and she was concerned the surgery could not predictably yield a  
8 good result. *Id.* In February 2016, Dr. Edwin Haronian, an examining spine  
9 specialist, opined plaintiff was a candidate for transforaminal lumbar interbody  
10 fusion. *Id.* at 690-91. Moreover, plaintiff appeared to have undergone right  
11 shoulder surgery in late 2015. *See id.* at 684; *see also id.* at 706, 722, 734. Thus,  
12 although plaintiff received conservative treatment, his physicians actually  
13 recommended non-conservative treatment.

14 It is unclear why plaintiff opted to continue with conservative care rather  
15 than undergo spinal surgery. *See AR at 680, 708, 730, 745.* Plaintiff explained  
16 why he declined epidural injections, namely, that he tried epidural injections but  
17 they did not provide lasting relief. *See P. Mem. at 6; AR at 631.* But he failed to  
18 explain why he did not proceed with the spinal surgery, although as noted, there  
19 were differing medical recommendations about this. *See Orn v. Astrue, 495 F.3d*  
20 *625, 638 (9th Cir. 2007)* (failure to seek treatment may be a basis for an adverse  
21 credibility finding unless there was a good reason for not doing so). Nor did  
22 plaintiff discuss his shoulder surgery.

23 Nonetheless, the ALJ did not discount plaintiff's testimony because he failed  
24 to seek treatment. The ALJ discounted plaintiff's complaints of chronic pain as not  
25 supported by his "relatively conservative treatment." AR at 44. Although on  
26 remand the ALJ may find plaintiff's complaints less than credible for other reasons  
27 such as a failure to seek treatment, the ALJ's finding of conservative treatment was  
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1 not supported by substantial evidence because physicians recommended non-  
2 conservative treatment including back surgery, and right shoulder surgery was  
3 actually performed.

4 The ALJ's second reason for discounting plaintiff's testimony was his  
5 symptoms were not supported by the objective medical evidence. *See* AR at 42-44.  
6 The lack of objective medical evidence to support allegations of limitations is a  
7 factor that may be considered when evaluating credibility, but it is insufficient by  
8 itself. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (lack of  
9 corroborative objective medicine may be one factor in evaluating credibility);  
10 *Bunnell*, 947 F.2d at 345 (an ALJ "may not reject a claimant's subjective  
11 complaints based solely on a lack of objective medical evidence to fully  
12 corroborate the alleged severity of pain"). Because the court has found that the  
13 ALJ's finding of conservative treatment was not supported by substantial evidence,  
14 the lack of objective medical evidence is the only remaining reason cited by the  
15 ALJ for finding plaintiff's complaints less than credible. This reason by itself  
16 cannot be a basis for discounting plaintiff's testimony.

17 Moreover, it does not appear the ALJ's finding of a lack of objective  
18 medical evidence was supported by substantial evidence. There is no dispute the  
19 objective medical evidence reflects severe impairments and supports functional  
20 limitations. The question is the extent of those limitations.<sup>2</sup> For the relevant  
21 period, the ALJ correctly noted that diagnostic imaging showed plaintiff had,  
22 among other things, osteophyte formation in the cervical spine with bilateral neural

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24       <sup>2</sup> The ALJ stated Dr. Harris, whose opinion he gave less weight, opined  
25 plaintiff should be precluded from repetitive cervical motion. *See* AR at 44. The  
26 record does not support this. The record in fact reflects Dr. Harris did not opine  
27 plaintiff could work with an accommodation of no repetitive cervical motion, but  
28 instead opined plaintiff was temporarily totally disabled in the worker's  
compensation context. *See, e.g., id.* at 667, 742.

1       foraminal narrowing, and disc bulge and facet arthropathy in the lumbar spine; a  
2       physician found no abnormal findings in a February 2016 x-ray of the knees;  
3       plaintiff frequently exhibited a normal gait; plaintiff exhibited a limited range of  
4       motion of the cervical spine, lumbar spine, and knees; and plaintiff had a normal  
5       range of motion in shoulder with pain on one occasion. *See* AR at 43, 1270, 1292-  
6       93, 1547-48. Based on those findings, the ALJ concluded the medical evidence did  
7       not support plaintiff's complaints of chronic pain. *See id.* at 43-44.

8       But the ALJ's analysis was incomplete. Although the ALJ is not required to  
9       discuss every piece of evidence in the record, he may also not omit evidence that is  
10      significant or probative. *Howard v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir.  
11      2003). The ALJ merely mentioned a few findings from over a thousand pages of  
12      medical records and failed to discuss other probative findings. A July 2015 MRI  
13      showed plaintiff had, among other things, a 3mm and 4mm disc herniation in two  
14      levels of the lumbar spine, both abutting the thecal sac. AR at 690. Plaintiff not  
15      only consistently exhibited limited range of motion in the cervical and lumbar  
16      spines, but also pain upon motion, tenderness, and spasm. *See, e.g., id.* 636-37,  
17      678-79, 686-89, 984-85, 1270, 1282, 1299, 1383, 1661. Although plaintiff had  
18      some negative straight leg raise and other pain evaluation tests, he also regularly  
19      had positive tests. *See id.* at 544, 689, 985, 1227, 1282, 1299. As for plaintiff's  
20      knee, although the ALJ correctly noted one physician observed no abnormal  
21      findings in the February 2016 x-ray of plaintiff's knee, upon review by another  
22      physician, the second physician diagnosed plaintiff with early degenerative joint  
23      disease because he found an irregular contour articular lateral facet, small superior  
24      patella marginal osteophyte. *See id.* at 1547, 1603.

25       Accordingly, the ALJ failed to cite clear and convincing reasons supported  
26       by substantial evidence for discounting plaintiff's complaints of chronic pain and  
27       symptoms.

V.

## **REMAND IS APPROPRIATE**

3        The decision whether to remand for further proceedings or reverse and  
4 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
5 888 F.2d 599, 603 (9th Cir. 1989). It is appropriate for the court to exercise this  
6 discretion to direct an immediate award of benefits where: “(1) the record has been  
7 fully developed and further administrative proceedings would serve no useful  
8 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting  
9 evidence, whether claimant testimony or medical opinions; and (3) if the  
10 improperly discredited evidence were credited as true, the ALJ would be required  
11 to find the claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020  
12 (9th Cir. 2014) (setting forth three-part credit-as-true standard for remanding with  
13 instructions to calculate and award benefits). But where there are outstanding  
14 issues that must be resolved before a determination can be made, or it is not clear  
15 from the record that the ALJ would be required to find a plaintiff disabled if all the  
16 evidence were properly evaluated, remand for further proceedings is appropriate.  
17 *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*,  
18 211 F.3d 1172, 1179-80 (9th Cir. 2000). In addition, the court must “remand for  
19 further proceedings when, even though all conditions of the credit-as-true rule are  
20 satisfied, an evaluation of the record as a whole creates serious doubt that a  
21 claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

22 Here, remand is required to resolve outstanding issues. On remand, the ALJ  
23 shall reconsider his determination regarding the credibility of plaintiff's subjective  
24 complaints. The ALJ shall then reassess plaintiff's RFC, and proceed through  
25 steps four and five to determine what work, if any, plaintiff was capable of  
26 performing.

1 VI.  
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3 **RECOMMENDATION**  
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5 IT IS THEREFORE ORDERED that Judgment shall be entered  
6 REVERSING the decision of the Commissioner denying benefits, and  
7 REMANDING the matter to the Commissioner for further administrative action  
8 consistent with this decision.  
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10 DATED: March 26, 2020  
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12 SHERI PYM  
13 United States Magistrate Judge  
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